ORIGINAL

No. 88-5806

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JUDITH ANN NEELLEY,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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ISSUES PRESENTED FOR REVIEW

1. Should the Court grant certiorari on petitioner's claims that the prosecution failed to produce exculpatory evidence where those claims are not worthy of certiorari review and are meritless?

2. Should the Court grant certiorari on petitioner's claim that newly discovered evidence exists where that claim does not present a constitutional question, is not worthy of certiorari review, and is meritless?

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OPINIONS BELOW

The state trial court's opinion denying petitioner relief on her petition for relief from conviction or sentence, Temporary Rule 20 of the Alabama Rules of Criminal Procedure, is unpublished but a copy is attached to this brief as Appendix A. On appeal from the denial of this petition, the Alabama Court of Criminal Appeals affirmed without opinion. The Alabama Supreme Court denied petitioner's petition for a writ of certiorari without opinion. Petitioner seeks review of the denial of certiorari by the Alabama Supreme Court in this Court.

On direct appeal, petitioner's conviction and death sentence were affirmed by the Alabama Court of Criminal Appeals, Neelley v. State, 494 So.2d 669 (Ala.Cr.App. 1985), and the Alabama Supreme Court, Ex parte Neeley, 494 So.2d 697 (Ala. 1986). Copies of these opinions are attached as Appendices B and C, respectively. On direct appeal, this Court denied certiorari. Neelley v. Alabama, 107 S.Ct. 1389 (1987).

JURISDICTION

The Alabama Supreme Court denied certiorari on August 19, 1988. This Court lacks jurisdiction to consider petitioner's newly discovered evidence claim because it involves a state law rule and does not present a federal constitutional question.

CONSTITUTIONAL PROVISIONS AND STATUTES

The petition raises issues involving the Fourteenth Amendment to the United States Constitution. In addition, this case involves Temporary Rule 20.1(e) of the Alabama Rules of Criminal Procedure, which provides as follows:

> Subject to the limitations of Rule 20.2, any person who has been convicted of a criminal offense may, without payment of any fee, institute a proceeding in the court of original conviction to secure appropriate relief on the ground that:
>
> . . .
>
> (e) Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because:

(1) the facts relied upon were not known by petitioner or his counsel at the time of trial or sentencing or in time to file a post-trial motion pursuant to Temporary Rule 13, or in time to be included in any previous collateral proceeding, and could not have been discovered by any of those times through the exercise of reasonable diligence; and

(2) the facts are not merely cumulative to other facts that were known; and

(3) the facts do not merely amount to impeachment evidence; and

(4) if the facts had been known at the time of trial or sentencing, the result would probably have been different; and

(5) the facts establish that petitioner is innocent of the crime for which he was convicted or should not have received the sentence that he did.

STATEMENT OF THE CASE

PRIOR PROCEEDINGS

Petitioner was indicted for kidnapping and murdering 13-year-old Lisa Ann Millican, in violation of Code of Alabama 1975, §13A-5-40(a)(1), "[m]urder by the defendant during a kidnapping in the first degree ... committed by the defendant." On March 22, 1983, petitioner was convicted of the charged capital offense and the jury recommended a life without parole sentence. On April 19, 1983, the trial judge sentenced petitioner to death.

The Alabama Court of Criminal Appeals affirmed petitioner's conviction and death sentence. Neelley v. State, 494 So.2d 669 (Ala.Cr.App. 1985) (Appendix B, attached). The Alabama Supreme Court affirmed. Ex parte Neelley, 494 So.2d 697 (Ala. 1986) (Appendix C, attached). This Court denied petitioner's petition for a writ of certiorari. Neelley v. Alabama, 107 S.Ct. 1389 (1987).

Petitioner then filed a petition for relief from conviction or sentence in the state trial court. An evidentiary hearing was held and, on October 9, 1987, the trial judge entered an order denying petitioner relief. (Appendix A, attached.)

FACTS

The trial judge found the following facts in his sentencing order:

> FINDING OF FACTS SUMMARIZING THE CRIME AND THE DEFENDANT'S PARTICIPATION IN IT
>
> The body of Lisa Ann Millican, age 13, was found in a gorge known as Little River Canyon near Fort Payne on September 29, 1982. Lisa was a resident of the Ethel Harpst Home, a Methodist home for neglected children located in Cedartown, Georgia.
>
> Lisa and five other girls from the home were taken by a house parent on an outing to Riverbend Mall in Rome, Georgia on September 25, 1982. While at the mall, Lisa became separated from the others. During this separation, she was abducted by the defendant, who asked Lisa to go "riding around." Lisa hesitated at first, but then agreed. The events which followed the

abduction led to the death of Lisa when the defendant shot her in the back on September 28, 1982, and threw her body into the canyon.

The abduction of Lisa Ann Millican was part of a bizarre scheme whereby the defendant attempted to lure girls and young women into the car with her for the ultimate purpose of making them available to her husband, Alvin Neelley, for sex with him. For several days immediately prior to Lisa's abduction, the defendant and Alvin drove up and down Rome streets in separate automobiles looking for girls who would be suitable. When Alvin would see one who appealed to him, he would communicate with the defendant by C-B radio, and the defendant would invite the girl to go riding around with her. Numerous girls refused the defendant's invitation; her first successful pick-up was Lisa Ann Millican.

The defendant took Lisa to a motel in Franklin, Georgia where she tried to persuade Lisa to submit to sex with Alvin, but Lisa resisted. Finally, Alvin told Lisa that if she did not submit to sex, the defendant would kill her. Following this threat, Alvin engaged in sex with Lisa, and later that night, Lisa was handcuffed to the bed to prevent her escape.

The next day, the defendant and Alvin, traveling in two cars, took Lisa with them to Cleveland, Tennessee where they picked up their two-year-old twins who were being cared for by Alvin's mother. Later that day, they traveled to Scottsboro, Alabama where they rented a motel room. Shortly after their arrival at the motel, the defendant hit Lisa in the head several times with a slapjack in an attempt to render her unconscious, but she was unsuccessful in achieving that result. Alvin then had sex with Lisa, and afterward Lisa slept overnight on the floor, unclothed, and handcuffed to the bed.

The following day, Alvin had sex with Lisa twice more despite her cries and pleas that he stop. The defendant was present during these sexual encounters and at one point during the day, she handcuffed Lisa to the plumbing in the bathroom and interrogated her about a man she had appeared to know at a dairy bar near the motel.

The next morning, Lisa was taken to Little River Canyon by the defendant where the defendant instructed Lisa to lie face down and place her hands around a tree. The defendant then handcuffed Lisa's hands. She explained to Lisa that she was going to give her a shot that would make her fall asleep and that when she waked up, Lisa would be free to go. Using a needle and syringe, the defendant injected Lisa in the neck with liquid drain cleaner. When Lisa did not die in five minutes, the defendant injected her again in the neck.

She injected Lisa four additional times, twice in the arms and twice in the buttocks, waiting about five minutes after each injection for Lisa to die. Twice during the infliction of these injections, Lisa requested to get up and "use the bathroom" in the woods. She was allowed to do so, and each time she returned and resumed her position on the ground with her hands around the tree.

Following the last injection, the defendant instructed Lisa to walk around for awhile to hasten the work of the poison in her body. When it finally appeared that Lisa was not going to die from the drain cleaner, the defendant marched Lisa to the rim of the canyon to shoot her in the back in a manner that would cause her body to fall into the canyon. Lisa begged to go back to the Harpst Home and promised not to tell what had happened. The defendant told Lisa to be quiet and then shot her in the back. Lisa fell backward toward the defendant instead of falling into the canyon. The defendant picked up the body and, using her knee, propelled it into the canyon.

During the defendant's trial testimony, she testified that Alvin was present at the canyon directing her every action. However, in an out-of-court statement made shortly after her arrest, the defendant stated that Alvin was not present at the canyon.

Five days after the death of Lisa Ann Millican, the defendant picked up a young woman named Janice Chapman and her common-law husband, John Hancock, from a street in Rome. Later that night, the defendant shot John Hancock in the back and left him for dead. He survived, however, and was present at the trial to testify to the incident.

The defendant and Alvin took Janice Chapman to a motel in Rome where Alvin engaged in sex with Janice. The next day, the defendant killed Janice Chapman, shooting her once in the back and twice in the chest. During the defendant's trial testimony, she testified that Alvin was present during the shooting of John Hancock and Janice Chapman and that he directed her to shoot them; however, in her out-of-court statement given shortly after her arrest, she stated that Alvin was present when she shot John Hancock but that he was not present when she killed Janice Chapman.

On October 9, 1982, the day before the defendant's arrest, she picked up another young woman in Nashville, Tennessee who was present with the defendant and Alvin in a motel room in Murfreesboro, Tennessee on October 10, 1982 when the defendant was arrested on a bad check charge. Later, this woman was released by Alvin unharmed.

> Alvin was arrested in Murfreesboro on October 13, 1982, also on a bad check charge. While the defendant and Alvin were in custody on the bad check charges, additional charges were placed against them arising from the murders of Lisa Ann Millican and Janice Chapman, and the shooting of John Hancock.

Neelley v. State, supra, 494 So.2d at 690-91.

In his opinion denying petitioner's petition for relief from conviction or sentence, the trial judge found the following facts from the evidentiary hearing on petitioner's Rule 20 petition:

> PETITIONER'S CLAIM THAT THE STATE FAILED TO DISCLOSE FAVORABLE EVIDENCE
>
> The petitioner contends that soon after her arrest and incarceration in the State of Tennessee in 1982, authorities searched the mobile home in Cleveland, Tennessee, where she and her husband had resided prior to their incarceration, and that among the items seized by authorities during that search were the following: one letter from Georgia lawyer, Marvin W. Mixon, who had represented petitioner on a previous occasion; seven letters from petitioner to her husband, Alvin Neelley; two letters from Alvin Neelley to petitioner; one letter from JoAnn Browning, Alvin Neelley's former wife, to Alvin Neelley's mother; and a document labelled "Classification Committee Actions." These twelve items were introduced as exhibits during the hearing on the petition and are a part of the evidence before the court.
>
> The petitioner contends that despite her counsel's attempts prior to the trial to discover the whereabouts of certain evidence, including that enumerated above, such evidence was withheld by authorities.
>
> Regarding this claim, the court makes the following findings of fact:
>
> 1. As a part of the investigation in this case, the petitioner's mobile home located in Cleveland, Tennessee was searched by authorities soon after the petitioner's arrest and incarceration. Among the items seized as a result of that search were the letters and certificate named above.
>
> 2. The search of the petitioner's mobile home was conducted by several law enforcement officials, one of whom was Tony Gilliland, an investigator for the Chattooga County, Georgia Sheriff's Office. Investigator Gilliland took much of the evidence seized to his home and asked his wife to inspect it for information relevant to certain investigations pending in the State of Georgia. The evidence consisted of two

> grocery bags and a box filled with letters, religious tracts, motel bills, photos of children, a speeding ticket, photos of the petitioner and her husband, a wallet, and some keys. Included in the evidence taken by Investigator Gilliland to his home were the letters and certificate mentioned above.
>
> 3. Attorneys for the petitioner attempted unsuccessfully prior to the trial to discover the whereabouts of the evidence seized from petitioner's mobile home and taken to Investigator Gilliland's home. The attorneys travelled to Cleveland and searched the petitioner's mobile home specifically looking for correspondence between the petitioner and her husband. They found letters from petitioner's husband to petitioner but none from petitioner to her husband because the attorneys' trip to the mobile home was subsequent to the seizure of such materials by authorities. Upon learning that Investigator Gilliland had participated in the search, the attorneys inquired of him on several occasions about the letters but each time Gilliland responded that he did not know of the letters or their whereabouts. The attorneys filed pre-trial discovery motions with this court. The motions, which were granted, did not seek discovery specifically of the letters in question but generally sought discovery of any exculpatory evidence.
>
> 4. The letters sought by petitioner were not produced by the authorities. The petitioner's attorney did not discover the whereabouts of the letters until February, 1985, when Investigator Gilliland's estranged wife contacted the attorney and told him of the letters and their whereabouts.
>
> 5. The petitioner does not claim nor is there any evidence that the DeKalb County, Alabama District Attorney's office which prosecuted this case knew of the evidence in question prior to trial nor that any law enforcement agency in Alabama knew of such evidence. To the contrary, the evidence is that prior to trial, the District Attorney's office provided petitioner's counsel with its complete file.
>
> The law is well established that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963). Although the information is in the possession of an investigating police agency and is not transmitted to the prosecuting attorney prior to trial, the law inputes [sic.] such information to the prosecutor. Watkins v. State, 509 So.2d 1064 (Ala. 1984).

When these principles of law are applied to the facts in this case, it follows that Investigator Gilliland's knowledge of the evidence which he had in his possession was imputed by law to the prosecutor in this case and that the prosecutor had a duty to disclose the information to the petitioner's attorneys provided the evidence was exculpatory and material. See United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); Watkins v. State, 509 So.2d 1064 (1984).

The items of evidence relied upon by the petitioner must be examined to determine if they are exculpatory and material.

Exhibit 1 is a letter from Marion [sic.] W. Mixon, an attorney in Albany, Georgia, to the Georgia Department of Human Resources written on petitioner's behalf. Petitioner asserts that this letter is material exculpatory evidence because it would have given her the name of her Georgia attorney and would have enabled her attorneys in this case to have contacted him as a part of their investigation. There is no showing, however, that the petitioner did not already know the name of her Georgia attorney even without the letter; moreover, there is reference to attorney Mixon in one of the letters from Alvin Neelley introduced by the petitioner at trial. The petitioner makes no showing of how contact with the Georgia attorney would have aided the petitioner in her defense. The court finds that this letter is not material exculpatory evidence and that there is no reasonable probability that production of the letter would have altered the outcome of the trial.

Exhibits 2, 3, 4, 5, 6, 9, and 10 are letters from petitioner to Alvin Neelley. The petitioner asserts that these letters are material exculpatory evidence because they reflect the extent to which she was dominated by her husband and support her claim that she was so dominated by him that she had no will of her own. The petitioner points to the following references found in the letters as evidence of such dominance:

1. A comment by petitioner about her husband always out-smarting people and about her keeping to herself;

2. A reference by the petitioner to her husband's "hypnotizing eyes";

3. A suggestion by the petitioner that parts of her letter would probably make her husband want to kill her; and

4. Petitioner's statement that she had been hearing her husband's voice by mental telepathy.

The letters are filled in large part with sentiments of love and devotion on the part of petitioner for her husband, but the letters also reflect assertiveness on the

part of petitioner which contrasts with notion that petitioner's husband was dominating her will. In one letter petitioner writes, "You are accusing me of shit I didn't do and had no intention of doing." In another letter, the petitioner accuses her husband of "going nuts," and yet another time she inquired if he was losing his mind. In response to someone having told her husband that she had been pregnant and had obtained an abortion, petitioner threatened: "I don't know who wrote that s--- to ya'll, but I will find out. Then everything will hit the fan. Just watch and see."

When each letter is considered in its entirety, none of them is supportive of petitioner's claim of her husband's total dominance over her. To the contrary, the letters reveal acts of independence on the part of the petitioner which tend to negate such a claim.

The court finds that Exhibits 2, 3, 4, 5, 6, 9 and 10 are not material exculpatory evidence and that there is no reasonable probability that these letters would have altered the outcome of the trial.

Exhibits 7 and 8 are letters from Alvin Neelley to the petitioner. These letters are not dissimilar to 16 letters from Alvin Neelley to the petitioner that were introduced by the defense at trial. To the extent that these letters reveal Alvin Neelley's attitude toward the petitioner, they are at most cumulative to the evidence presented at trial.

The court finds that there is no reasonable probability that Exhibits 7 and 8 would have altered the outcome of the trial.

Exhibit 11 is a letter to Alvin Neelley's mother from his former wife, JoAnn Browning. The letter has no probative value. The court finds that it is not material exculpatory evidence and there is no reasonable probability that this letter would have altered the outcome of the trial.

Exhibit 12 is a document with the hearing "Classification Committee Actions" which shows Alvin Neelley's job assignment in prison as that of Chaplain's Aide. The document has no probative value. The court finds that it is not material exculpatory evidence and there is no reasonable probability that the document would have altered the outcome of the trial.

The remaining items withheld were introduced at the hearing by the State as State's Exhibit 2. Petitioner makes no assertion as to these items, and the court finds that nothing in these items is material exculpatory and there is no reasonable probability that these items would have altered the outcome of the trial.

Having considered the petitioner's claims regarding the withheld evidence, the court finds that there is no reasonable probability that any of the evidence would have altered either the guilt or punishment stage of petitioner's trial; that the prosecution's failure to disclose these items of evidence did not substantially affect the petitioner's right to a fair trial; and that the petitioner's right to due process was not violated by the prosecution's failure to produce the items prior to trial.

PETITIONER'S CLAIM OF NEWLY DISCOVERED EVIDENCE - ITEMS SEIZED IN SEARCH OF MOBILE HOME

The petitioner asserts a claim of newly discovered evidence based upon the evidence discussed above and contends that the newly discovered evidence warrants a new trial.

The court finds that even if this evidence had been available to petitioner at the time of trial or sentencing, there is no reasonable probability that the result would have been different. Further the court finds that the newly discovered evidence does not establish the petitioner's innocence and does not establish that she should not have received the sentence that she did.

For these reasons, the petitioner's claim for relief based on newly discovered evidence as described above is denied.

PETITIONER'S CLAIM OF NEWLY DISCOVERED EVIDENCE - BATTERED WOMAN

The petitioner contends that since the time of her trial new research concerning the "battered woman defense" has become available and that such information constitutes newly discovered evidence which entitles her to a new trial.

In support of her claim, the petitioner offers the testimony of Dr. Charles Patrick Ewing, a professor of law and psychology at State University of New York at Buffalo. Dr. Ewing holds a Ph.D. in psychology from Cornell University and a Juris Doctor from Harvard Law School. He is the author of a book entitled, Battered Women Who Kill, and he has done extensive research in the field of battered women.

Dr. Ewing testified that the first book on the subject of battered women was published in 1979 and that numerous books and law review articles have been published since that time. He stated that most of the development in the field has been since 1983.

Dr. Ewing testified that research reveals the following about battered women: (1) they are victims of "learned helplessness"; (2) they generally have no community of support because they are frequently isolated by their husbands; (3) the husband demonstrates excessive jealousy manifested by threats that he will kill the wife or their children if the wife leaves him; (4) the wife loses her capacity to make even small decisions; and (5) the husband acquires such control over the woman that she is willing to kill herself rather than to kill the spouse.

Dr. Ewing explained that according to a study he has conducted, public opinion sterotypes the battered woman as a person who enjoys beatings, stays with her battering spouse because of some emotional need, and has the freedom to leave him at will, and that because of these sterotypes, it is essential that an accused who is relying upon the battered woman defense use expert testimony to explain the battered woman syndrome.

While Dr. Ewing undoubtedly is one of the country's foremost authorities on the subject of battered women, the court finds that his testimony does not support the petitioner's claim for relief for the following reasons:

1. Although Dr. Ewing concludes that petitioner was a battered woman and acted under the substantial domination of her husband at the time she killed Lisa Ann Millican, he acknowledges that available research shows that when battered women kill, they generally kill their batterers. He testified that the case before the court is the only one in which he has been involved where the battered women defense was used to defend against the killing of a person other than the battering spouse. As he points out in his book, the battered woman defense has been recognized only when claimed in support of self-defense:

> In recent years, a number of commentators have described what they call the "battered woman syndrome defense" to homicide charges. In fact, as should be clear by now, there is no such defense. What these commentators have called the "battered woman syndrome defense" is nothing more than the admissibility of expert testimony regarding the syndrome in support of a battered woman homicide defendant's self-defense claim.

2. Because none of the studies cited by Dr. Ewing concern homicide or violence committed by a battered woman against persons other than that of the batterer, none of the post-trial developments in the study of the battered woman syndrome, if

they had been known at trial, created a reasonable probability that the outcome of petitioner's trial or sentencing would have been different.

3. Because the battered woman syndrome was developed in 1979, four years before petitioner's trial, evidence of it could have been presented at trial through the exercise of reasonable diligence. An example of the testimony available at the time of petitioner's trial is that given at the hearing on petitioner's motion for new trial by Margaret Nichols, whose testimony was essentially the same as parts of Dr. Ewing's testimony.

4. The testimony of Dr. Ewing does not establish that the petitioner is innocent of the crime for which she was convicted or should not have received the sentence that she did.

ARGUMENT

I.

CERTIORARI SHOULD NOT BE GRANTED ON PETITIONER'S CLAIMS CONCERNING THE PROSECUTION'S ALLEGED FAILURE TO PRODUCE EXCULPATORY EVIDENCE BECAUSE THEY ARE NOT WORTHY OF CERTIORARI REVIEW AND ARE MERITLESS

Petitioner raises two claims concerning the prosecution's alleged failure to produce material exculpatory evidence, that his conviction was obtained by the prosecution's failure to produce material exculpatory evidence and that the prosecution's "intentional secreting of exculpatory evidence" violated his constitutional rights. This Court should deny certiorari for two reasons.

First, these claims are not worthy of certiorari review. Resolution of these claims involves only the application of the Court's holdings in Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Bagley, 473 U.S. 667 (1985), to the particular facts of petitioner's case. In deciding these claims, the state trial court used the legal tests set out in those decisions. A case, such as petitioner's, which only involves the application of clear precedent to a specific fact situation will have no broad precedential value. The demands on this Court's time are too great for the Court to spend its resources deciding cases of such narrow impact.

The second reason for denying certiorari on these claims is that they are without merit. The evidence upon which this claim is based, letters and assorted other documents seized in a search of petitioner's trailor, was not exculpatory and even if assumed to be exculpatory was not material.

The state trial judge carefully reviewed the twelve exhibits selected by petitioner as best illustrating the exculpatory nature of the seized documents and also examined the remaining unproduced documents. After this review, the trial judge found that the items seized from petitioner's trailer were not exculpatory or material. Examination of the documents selected by petitioner shows that the trial judge's finding was correct.

The documents selected by petitioner for introduction into evidence were a letter from a Georgia lawyer, Marvin W. Mixon, several letters from petitioner to her husband, Alvin Neelley, two letters from her husband to petitioner, one letter from Joann Browning, Alvin Neelley's first wife, to Alvin Neelley's mother, and one form labeled "Classification Committee Actions." Copies of these documents are attached as Appendix D to this brief. Having selected these 12 documents, petitioner must contend that, out of all the items seized, they are the documents most favorable to her defense. Upon examination, it is apparent that these 12 documents, and thus the remaining items, are not exculpatory as they do not show her to be innocent or less culpable and do not impeach any prosecution witness. These 12 documents, and the remaining items, are also not material as there is no probability that, had they been produced, the outcome of petitioner's trial would have been different.

Defendant's Exhibit 1 at the Rule 20 hearing was a letter from Marvin W. Mixon, an Albany, Georgia attorney, to the Georgia Department of Human Resources on petitioner's behalf. At the evidentiary hearing, Stephen Bussman, one of petitioner's trial lawyers, testified that if he had had this letter he would have contacted Mixon and talked to him about

his representation of petitioner. Bussman also speculated that Mixon could have given background information about petitioner's relationship with her husband and family, and about the circumstances of her arrest and confinement in Georgia. Petitioner did not call Mixon as a witness at the Rule 20 evidentiary hearing.

The information that petitioner speculated she might have gained from Defendant's Exhibit 1 is, on its face, not exculpatory. However, even assuming that the name of petitioner's Georgia lawyer would have been helpful to her defense at trial, petitioner and her lawyers were aware of the name of the lawyer with whom she claimed to have had sex and the name of the Georgia attorney who wrote Defendant's Exhibit 1. Petitioner testified at trial that her husband claimed that she had engaged in sex with her then attorney, Robert Cauthen, and that her husband's claim was not true. Further, letters from Alvin Neelley, introduced by Neelley at trial, contain references to his lawyer, Mixon. Thus, the information which petitioner hoped to gain from this letter was already known by her at trial. Even if the letter was not disclosed, it was not exculpatory. Even if the letter could be viewed as exculpatory, it is not material because the information it contains, or supposedly could have led to, was presented at trial. Petitioner's claim is utter nonsense: the failure to disclose information known to her created a reasonable probability that, but for the nondisclosure of information presented by her at trial, the outcome of her trial would have been different.

Defendant's Exhibit 2 at the Rule 20 evidentiary hearing was a letter from petitioner to her husband. At the evidentiary hearing, petitioner made specific reference to portions of the letter in which she said that she thought her husband had "e.s.p." or telepathy and discussed her dreams.

This letter does not show petitioner to have been so dominated by her husband as to have no will of her own, as petitioner contended at trial. From the beginning, "To My

Darling, Loving Husband," to the end, "Your Loving Wife, With Eternal Love," the letter recounts the recent events in her life, and discusses their relationship. This letter cannot be fairly construed as showing that Neelley thought her husband was omniscient or that he controlled her mind.

Defendant's Exhibit 3 at the Rule 20 hearing was a letter from petitioner to her husband. At the evidentiary hearing, petitioner made specific reference to a portion of the letter in which she said that her husband always outsmarted the people who tried to outsmart him, and that he was not to worry about her because she was going to keep to herself.

Examination of Defendant's Exhibit 3 reveals that petitioner's comments on her husband's ability to outsmart people were made out of admiration and not fear. Her reference to keeping by herself pertained to some trouble with another inmate at the Youth Development Center where she was incarcerated which could have resulted in her being punished. Petitioner, sensibly, was going to keep to herself to avoid trouble and not because her husband wanted to isolate her.

Defendant's Exhibit 4 at the Rule 20 hearing was a letter from petitioner to her husband. At the evidentiary hearing, petitioner argued that her reference to her husband being so angry he could kill her showed his domination of her. Contrary to her assertion, this letter showed that petitioner was not dominated but was able to assert herself. Petitioner wrote:

> I love you babe. I'm your wife and I plan to keep it that way. I'm not interested in Mike and I never was. And I didn't take up for him. I was taking up for myself. You are accusing me of shit I didn't do and had no intentions of doing.

(emphasis in original and added, respectively) The rest of the letter is a straightforward account of her letter writing activities, in which she told her husband things she knew would make him angry, without any fear of his reaction. This letter, if anything, showed petitioner to be capable of sticking up for herself and did not show her to be dominated or controlled by her husband.

Defendant's Exhibit 5 at the Rule 20 hearing was a letter from petitioner to her husband. At the evidentiary hearing, petitioner claimed that this letter showed that she knew her husband would kill her family, apparently if she did not keep to herself. Again, contrary to Neelley's representation, this letter shows her to have been a match for, and not the victim of, her husband.

In response to an apparent complaint from her husband about some stamps she sent him, petitioner wrote:

> First of all, I don't see why you got so mad when I sent you those stamps. You said you needed some, so I sent all I had. And since you throw alot of bull at me, I'm going to do the same to you. ...

(emphasis added) Petitioner added that her husband's complaints made her think he was "going nuts." Later in the letter, in response to another complaint from her husband, petitioner wrote:

> By the way, who is my "cop friend"? I don't have any cop friends. The only one I can figure that you are talking abort is Elaine Snow. And she isn't a friend. She tried to be, but I don't make cops my friends.

(emphasis added) In response to a complaint about not signing her name as Mrs. Judy Neelley, petitioner asked if her husband was losing his mind. This letter does not exculpate petitioner but shows the true, hardened petitioner who would not back down from her husband and who did not make friends with cops. The true petitioner is not the victim she tried to pass herself off as at trial and this letter undercut her defense.

Defendant's Exhibit 6 at the Rule 20 hearing was a letter from petitioner to her husband. Like the two previous letters, this letter showed that she was not dominated by her husband. In response to learning that someone had told her husband that she had been pregnant but had an abortion, petitioner made the following threat:

> So I don't know who wrote that sh__ to ya'll, but I will find out. Then everything will hit the fan. Just watch and see!

Elsewhere in the same letter, Neelley told her husband that she had learned to take responsibility for her own actions.

Defendant's Exhibit 7 at the Rule 20 hearing was a letter from her husband to petitioner. This letter is indistinguishable from the sixteen letters from her husband that petitioner introduced at trial. To the extent that this letter could have been offered along with the rest as support for petitioner's claim that she was a battered woman, it adds nothing to the trial evidence and is not material. There is no reasonable probability that, but for the absence of this letter, the outcome of petitioner's trial would have been different.

Defendant's Exhibit 8 at the Rule 20 hearing was a letter from her husband to petitioner. Like Defendant's Exhibit 7, this letter is cumulative and adds nothing to the letters introduced at trial. There is no reasonable probability that, but for the absence of this letter, the outcome of Neelley's trial would have been different.

Defendant's Exhibit 9 at the Rule 20 hearing was a letter from petitioner to her husband. Like Defendant's Exhibits 4, 5, and 6, this letter shows that Neelley was able to stand up for herself in response to her husband's letters and was not under his domination and control.

Defendant's Exhibit 10 at the Rule 20 hearing was a letter from petitioner to her husband. This letter is another discussion of petitioner's mail problems and a recounting of recent events in her life. It simply does not add anything to her defense. This letter is illustrative of the contents of the letters in State's Exhibit 2 at the Rule 20 hearing, which were not selected by petitioner for introduction.

Defendant's Exhibit 11 at the Rule 20 hearing was a letter from Joann Browning, Alvin Neelley's first wife, to her former mother-in-law. This letter is not exculpatory but rather is simply irrelevant. It does not indicate petitioner's innocence or have impeachment value.

Defendant's Exhibit 12 at the Rule 20 hearing was a form, apparently from the Georgia prison system, with the heading "Classification Committee Actions," which showed that petitioner's husband was assigned as a chaplain's aide. This

document is simply irrelevant and is not material exculpatory evidence.

None of the items that were seized in the search of petitioner's trailer amounted to material exculpatory evidence and she had no constitutional right to have these items produced at trial. That this claim is totally devoid of merit is best illustrated by petitioner's twelve exhibits. Petitioner obviously selected these items because they were the most helpful to her case but, as shown above, none of the items were helpful, and many would have been harmful, to her defense. Petitioner has not shown that the production of any of the items would have benefitted her and there is no reasonable probability that, but for their absence, the outcome of her trial would have been different.

II.

CERTIORARI SHOULD NOT BE GRANTED ON PETITIONER'S CLAIM THAT NEWLY DISCOVERED EVIDENCE REQUIRED A NEW TRIAL BECAUSE THIS CLAIM DOES NOT PRESENT A CONSTITUTIONAL QUESTION, IS NOT WORTHY OF CERTIORARI REVIEW, AND IS MERITLESS

It is not clear from petitioner's petition for a writ of certiorari what allegedly newly discovered evidence is the basis for her claim. In her state collateral petition and on the appeal from the denial of that petition, petitioner claimed two kinds of newly discovered evidence, the same allegedly exculpatory evidence she claimed was withheld by the prosecution, and expert testimony concerning abused women. If her claim is still what it was, then the Court should deny certiorari for three reasons.[1]

First, petitioner's newly discovered evidence claim does not present a federal constitutional question but is rather a claim that she was entitled to relief under a state evidentiary rule, Temporary Rule 20.1(e) of the Alabama Rules of Criminal Procedure. This Court's review of state court decisions is

[1] If it is something different from the claim raised in the appellate courts below, then this Court is without jurisdiction to hear it. Street v. New York, 394 U.S. 576, 581-82 (1969); Bailey v. Anderson, 326 U.S. 203, 206-07 (1945).

limited to issues implicating the federal constitution. E.g., Chandler v. Florida, 449 U.S. 560, 570 (1981) ("This Court has no supervisory jurisdiction over state-courts, and, in reviewing a state court judgment, we are confined to evaluating it in relation to the Federal Constitution.")

Second, even if before the Court, this claim is not worthy of certiorari review. It is not only not set out clearly in the petition but resolution of this claim involves only the particular facts of this case and will have no broad precedential value. The demands on this Court's time are too great for the Court to spend its resources deciding cases of such narrow impact.

The third reason for denying certiorari is that this claim is meritless. None of the items seized in the search of petitioner's trailer amount to newly discovered evidence under Temporary Rule 20.1(e). Again, this is best illustrated by examination of the twelve documents selected and offered by petitioner as the evidence most favorable to her defense.

Defendant's Exhibit 1, the Mixon letter, is not newly discovered evidence. Petitioner cannot seriously contend that information presented at her trial would have changed the outcome of that trial or established her innocence if it had been presented and, thus, her claim is meritless.

Defendant's Exhibits 2-6, 9, and 10, letters to her husband from petitioner, are not newly discovered evidence. To the extent that the letters would have supported petitioner's battered woman defense, they are cumulative to her trial testimony that she was abused by her husband. The letters, which if anything undercut her defense, would not have changed the result of petitioner's trial. Finally, the letters do not establish petitioner's innocence of the capital offense or that she should have received a lesser punishment. These letters, if anything, indicate that petitioner's claim to have been dominated and controlled by her husband was a lie manufactured by her in an attempt to save her life.

Defendant's Exhibits 7 and 8, letters to petitioner from her husband, are not newly discovered evidence primarily because they are cumulative to the 16 letters from her husband that Neelley introduced at trial. Additionally, these two letters would have had no greater impact on petitioner's trial than the 16 letters she did introduce so these letters would not have changed the result and do not show her innocence or that her sentence should be different.

Defendant's Exhibit 11, the letter to petitioner's mother-in-law from Joann Browning, Alvin Neelley's first wife, is not newly discovered evidence for several reasons. First, the letter contains no information helpful to Neelley and simply is not evidence of any kind. Browning's church attendance and desire for forgiveness from Alvin Neelley's mother cannot by any stretch of the imagination constitute evidence. Second, Browning testified as a defense witness at trial and, to the extent this letter is evidence, it was or could have been known to Neelley and her lawyers at trial. Third, this letter, to the extent it is evidence of any facet of Browning's relationship with Alvin Neelley, is cumulative to Browning's trial testimony. Fourth, this letter, which is both innocuous and irrelevant, would not have changed the result of petitioner's trial. Finally, this letter does not establish petitioner's innocence or that she should not have been sentenced to death.

Defendant's Exhibit 12, the Georgia prison form showing that petitioner's husband was assigned to work as a chaplain's aide, is not newly discovered evidence because it is irrelevant to any issue at trial. Petitioner's assertion that this form is newly discovered evidence is frivolous and underscores the utter lack of merit in this entire claim.

Petitioner's claim that there is newly discovered evidence in the form of research concerning abused women is equally meritless. At the evidentiary hearing, petitioner called Dr. Charles Ewing, a lawyer and psychologist from Buffalo, New York. Ewing's testimony concerned two areas, post-trial

developments in battered woman syndrome research and whether petitioner was a battered woman controlled by her husband. The trial judge found that Ewing's testimony about post-trial developments in battered woman syndrome research and about Neelley's being a battered woman was not newly discovered evidence. Appendix A, attached.

Ewing's testimony about post-trial developments in research into the battered woman syndrome was properly found not to constitute newly discovered evidence. Ewing testified that the battered woman syndrome as a psychological concept had been in existence since 1979. Ewing's own post-trial research does not constitute newly discovered evidence because it would not have changed the outcome of her trial or established that petitioner was innocent or should have been given a lesser sentence. As the trial judge noted, neither Ewing's studies nor those he cites involve cases where a battered woman killed someone other than her batterer. Testimony about studies involving facts completely different from the facts of petitioner's case would not have affected the outcome of her trial.

Ewing's testimony that petitioner was a battered woman and was under the control of her husband is also not newly discovered evidence. As noted above, the battered woman syndrome existed as a concept well before petitioner's trial. Evidence such as Ewing's opinion could have been presented at the time of trial.

Further, Ewing's opinion that petitioner was a battered woman would not have affected the outcome of her trial and, thus, is not newly discovered evidence. In Ewing's research and personal experiences, which involved literally hundreds of cases, he had never encountered a case where a battered woman had killed a person other than her batterer. He knew of no case where an abused woman kidnapped, tortured and shot a thirteen year old child. Ewing's opinion, which if not contradicted by his own research was unsupported by his professional experience, would not have been helpful to petitioner.

CONCLUSION

For the reasons stated, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William D. Little, a member of the Supreme Court Bar, certify that I have served a copy of this brief on petitioner by placing a copy in the United States Mail, first class postage prepaid, and properly addressed to his counsel as follows:

Hon. Robert B. French, Jr.
P.O. Box 596
Fort Payne, Alabama 35967

Done this 9th day of November, 1988.

William D. Little
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